SINGAPORE REPORTS

Re Howard E Cashin

HIGH COURT (SINGAPORE) - ORIGINATING SUMMONS NO 992 OF 1987
WEE CHONG JIN CJ, THEAN AND CHUA JJ
6 JULY 1989

Legal Profession - Disciplinary proceedings - Whether 'complaint' under s 82(1) of the Legal Profession Act exists - Allegation of solicitor's breach of contract with client - Whether constitutes misconduct - Breach of Solicitors' Accounts Rules 1967 - Appropriation of client's costs into office account - Solicitor-client agreement regarding costs - Misconduct by taxing party and party costs in excess of agreement - Whether agreement merely to limit solicitor and client costs in all cases or whether limitation only applicable if other party impecunious - Disciplinary Committee's findings on matter - Whether findings reversable by court - Misconduct by appropriating client's money - Legal Profession Act (Cap 161, 1985 Ed), ss 80, 82(1), 86(1), 108 & 109(1) - Solicitors' Accounts Rules 1967, r 3

Words and Phrases - 'Complaint of the conduct' - Legal Profession Act (Cap 161, 1985 Ed), s 82(1)

The respondent is an advocate and solicitor of the Supreme Court and a senior partner of the law firm of Murphy and Dunbar. In the present proceedings, an order nisi was made to discipline him under s 80 of the Legal Profession Act (Cap 161, 1985 Ed) and he was ordered to show cause why he should not be dealt with accordingly. The facts as far as they were undisputed are as follows. The complainant instructed the respondent to act for a company ('the company') of which the complainant was, at all material times, a director and principal shareholder. The respondent was instructed to resist a winding-up petition ('the petition') that had been presented against the company. The respondent accepted the instructions and assigned a legal assistant in the firm to assist him in the matter. The petition against the company was dismissed. Later, the taxed party and party costs which were awarded to the complainant were paid by the respondent's law firm into the office account.

The events that followed the dismissal of the petition were acutely in dispute. The complainant claimed that the respondent had agreed to limit the costs payable by her to $25,000 to the respondent's law firm. The respondent denied that he had agreed to this and claimed that the agreement was that such costs would only be limited if the petitioner (of the winding - up petition) was unable to bear the party and party costs awarded against it. After that, the complainant wrote a letter, enclosing correspondence between herself and the respondent's law firm, to the Law Society describing the events that had occurred and sought the help of the Society in resolving their dispute. Disciplinary proceedings against the respondent were started. He was charged with breach of r 3 of the Solicitors' Accounts Rules 1967 by paying client's money into the office account, breach of s 109(1) of the Legal Profession Act in that he taxed party and party costs in excess of the agreed solicitor and client costs, and the wrongful appropriation of party and party costs which lawfully belonged to the complainant. The Disciplinary Committee ('the Committee') hearing the matter determined that cause of sufficient gravity existed against the respondent in respect of all three charges. The Committee concluded that although the complainant's letter to the Law Society did not expressly allege misconduct by the respondent, due allowance should be made for the fact that it was written by a lay person. There was thus a complaint under s 82(1) of the Legal Profession Act. The Committee also decided that each partner in the respondent's law firm had a joint responsibility to ensure that there was no breach of the Solicitors' Accounts Rules. As regards the second charge, the Committee found that the complainant was a more credible witness than the respondent, and found the respondent guilty of the charge. In relation to the third charge, the Committee decided that the party and party costs which were appropriated to the office account were undoubtedly in accordance with normal book-keeping practice, taken as profit for the year which was distributable as profit among the partners of the firm, and there was no evidence from an accountant or auditor to prove the contrary.

Held, discharging the order nisi to show cause:

(1) The cases showed that a 'complaint' meant an accusation of misconduct. A complaint that concerned a civil dispute simpliciter, unaccompanied by any allegation of misconduct, does not consitute a 'complaint of the conduct' within s 82(1) of the Legal Profession Act.

(2) In the complainant's letter to the Law Society, she made no allegation of impropriety or misconduct on the part of the respondent. The letter merely sought guidance and help in the dispute with the respondent's law firm. Since the letter made reference to and enclosed an exchange of correspondence between the complainant and the respondent's law firm, it was necessary to examine these in some detail to see whether or not they contained any allegation of misconduct against the respondent personally.

(3) The letters showed that there was a dispute between the complainant and the respondent's law firm as to the precise terms of the agreement that they had entered into regarding costs. There was no suggestion that the respondent had ever intended to deprive the complainant of anything that might be due to her.

(4) This was a dispute which should be resolved in a civil court. A breach of contract simpliciter cannot in any way constitute an allegation of misconduct.

(5) The Committee hearing the matter took the approach that the complainant could not be expected to put her allegation in legal language or to refer to the provisions of the Legal Profession Act. This, however, ignores the fact that the complainant's letter of complaint was drafted with the assistance of another advocate and solicitor. The conclusion of the Committee was thus against the weight of evidence, and without foundation.

(6) There was therefore no valid 'complaint' against the respondent and the proceedings failed at the outset. However, because the full argument was heard on the substantive charges against the respondent and because such charges raised matters of concern to the respondent and to the profession generally, the court would discuss them.

(7) The first charge against the respondent is a charge of a personal character, and relates strictly to the conduct of the respondent himself. It was agreed that at the time of the payment of the money into the office account, the respondent was not in Singapore and had nothing to do with the payment.

(8) The Committee's conclusion that there was joint responsibility for the payment failed to distinguish between 'joint and several responsibility', a civil responsibility, on the one hand

and a disciplinary responsibility on the other. The exercise of disciplinary power is essentially punitive and penal and is exercised in appropriate cases only where there is personal complicity by the solicitor charged. In certain cases, the negligence of a solicitor in relation to a client account may amount to professional misconduct, 'if it is inexcusable and is such as to be regarded as deplorable by his fellows in the profession'.

(9) In the present case, the Committee made no finding that the respondent was personally implicated in the breach of the rules, and there was no evidential basis for such a finding. The first charge must therefore fail.

(10) As regards the second charge, in deciding whether the Committee came to the correct finding that there was an oral agreement between the respondent's law firm and the complainant limiting solicitor and client costs to $25,000, the whole of the evidence had to be examined to see if the evidence points to equal probability of an agreement which was as the respondent claimed in his defence.

(11) The Committee's findings were essentially matters of fact, but where it appears from the evidence that the wrong decision in fact has been reached, it can be reversed, due regard being had to the court's disadvantage in not seeing or hearing the witnesses.

(12) There was no dispute that there was an agreement respecting costs, the dispute relating solely to the terms of the agreement. It was necessary to test the assessment of the Committee, on an objective litmus test, by reference to a number of specific issues.

(13) The complainant's evidence was not entirely consistent as her denial of a meeting between herself and a legal assistant in the respondent's law firm was only broken under persistent cross-examination. A careful perusal of the complainant's evidence regarding a telephone conversation and that same legal assistant revealed the inconsistency between her examination-in-chief and her cross-examination, which at least would have cast doubts on her credibility.

(14) The letters passing between the complainant and the respondent's law firm were either equivocal or supportive of the respondent's case. It was important to bear in mind that the letters were written not to a disinterested observer, but to a party to an agreement, and giving due allowance in this regard, it is impossible to say that they prove conclusively that there was an oral agreement on the terms alleged by the complainant.

(15) There was no reason for the respondent to enter into any agreement limiting his firm's costs to $25,000 in light of the fact that (a) the time the agreement was entered into was after the successful hearing of the petition, and (b) the party and party costs had not been taxed. No lawyer in his senses would agree to limit his solicitor and client costs to a figure which would certainly be below the amount of party and party costs if there was no doubt about the ability to pay such costs by the other party. No other construction makes sense. One of the letters written by the respondent to the complainant also supported this view.

(16) The complainant denied that she told the respondent that the petitioner might be impecunious, but this part of the evidence of the respondent was not challenged in cross-examination by the Law Society's counsel. The respondent gave reasons for his failure to account for his delay in submitting a bill to the complainant but these were rejected as 'lame excuses' by the Committee. But the respondent's reasons for the delay were never challenged by the Law Society's counsel in cross-examination.

(17) The findings of the Committee on the second charge cannot be sustained. Because of this decision, it was unnecessary for the court to deal with the alternative submission.

(18) In a fundamental sense, the third charge was contingent upon the first charge. Since the respondent was not personally implicated in the first charge, the person responsible for the appropriation under the second charge was not the respondent. The Committee's view failed to appreciate that they had no basis for their inference. In the absence of evidence from the firm's accountant or a public accountant, it was not a matter on which the Committee could properly infer that the appropriated money would, in any event, have been appropriated at a later date by the respondent and his partners. The onus of proof lay throughout on the Law Society to prove that wrongful appropriation took place. This onus was not discharged.

(19) The order nisi to the respondent to show cause was thus discharged. There would be no order as to costs.

Cases referred to

1 *Harmon* v *Park* (1880) 6 QBD 323 (folld)
2 *In Re An Advocate and Solicitor* [1950] MLJ 113 (folld)
3 *Myers* v *Elman* [1940] AC 282 (folld)
4 *Re a Solicitor* [1972] 2 All ER 811 (folld)

Legislation referred to

Legal Profession Act (Cap 161, 1985 Ed) ss 80, 82(1), 86(1), 108, 109(1)
Solicitors' Accounts Rules 1967 r 3

Kevin Lightman QC for the respondent.
Cheong Yuen Hee for the Law Society.

Cur Adv Vult

Wee Chong Jin CJ (delivering the judgment of the court): The respondent is an advocate and solicitor of the Supreme Court and a senior partner of the firm of Messrs Murphy & Dunbar. In these proceedings, the respondent is ordered to show cause why he should not be dealt with under s 80 of the Legal Profession Act ('the Act').

The facts, as far as they are undisputed, are these. Sometime in early December 1981, the complainant, one Madam Chua Mui Ying ('the complainant') instructed the respondent to act for a company known as MY Holdings (Pte) Ltd ('the company') of which the complainant, at all material times, was a director and principal shareholder. The respondent was instructed to resist a winding-up petition ('the petition') presented against the company by the administrators of the estate of Albert PC Wong ('Wong's estate'), the holder of one subscriber share in the company.

The respondent accepted the instructions and assigned one Mr Clive Heng ('Heng'), a legal assistant in Murphy & Dunbar, to assist him in the matter. Thereafter, the complainant attended Heng at his office on several occasions in January, February and March 1982 to give

instructions and to receive legal advice. On 4 March 1982, the complainant received a letter dated 3 March 1982 from Heng. The letter is as follows:

> You will appreciate that we have done a certain amount of work for you in connection with the above matter and it is a practice of our firm to request payment of fees as the matter progresses.
>
> We would request that you remit to us a sum of $2,000 to account to our costs and disbursements incurred to date.

The complainant made payment on 5 March 1982. On 15 April 1982, Heng wrote another letter to the complainant, requesting payment of the further sum of $8,000 'to account of our costs'. The material paragraph of the letter is as follows:

> ... Our Mr Heng has on your last visit to our office spoken to you on the question of our costs. You will be aware that it is our practice to ask for payment to account of our costs as the matter progresses. We will therefore ask that you pay us a further sum of $8,000 to account of our costs.

The complainant paid the sum on or about 22 April 1982. The petition was heard on 26, 27 and 28 April 1982, when it was adjourned partheard to 21 and 22 October 1982, when it was dismissed with costs.

The events following the dismissal of the petition were acutely in dispute, and they form the basis of the present disciplinary proceedings against the respondent. In the statement of case by the Law Society, it was alleged as follows:

> 12 After the said petition was dismissed with costs as aforesaid, Heng orally advised the complainant that the petitioners might appeal to the Court of Appeal. In early November 1982 Heng advised the complainant that the petitioners had filed their notice of appeal on 1 November 1982. The complainant again wanted to know what the solicitor and client costs would be up to and including the disposal of the appeal. Heng then orally agreed on behalf of the respondent/Murphy & Dunbar with the complainant that the solicitor and client costs would be $25,000. As the complainant had already paid $10,000 to account, there would be a balance of $15,000 payable.
>
> 13 Following the said oral agreement, the respondent and/or Heng wrote a letter which reduced it to writing dated 26 November 1982 to the complainant requesting payment of the said balance of $15,000. The complainant paid the said sum of $15,000 on or about 27 December 1982 and received Murphy & Dunbar's receipt therefor together with their covering letter, both dated the same day.
>
> 14 Section 112(1) (now s 109(1)) of the Legal Profession Act (Cap 217) provides that in contentious business where there is an agreement in writing between a solicitor and his client respecting the amount of his costs, either by gross sum or otherwise, the costs recoverable by the client from any other person in respect of the same matter shall not exceed the amount payable by the client to his own solicitor under the agreement.
>
> 15 Contrary to the terms of the said agreement between the respondent and the complainant, and the provisions of s 112(1) (now s 109(1)) of the Legal Profession Act the respondent taxed or caused to be taxed the party and party costs in respect of the said petition at $35,121.75 on 7 December 1982.
>
> 16 The petitioners paid the taxed costs on or about 13 January 1982 to the respondent.
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> 17 Rule 3 of the Solicitors' Accounts Rules 1967 provides that every solicitor who holds or receives client's money shall without delay pay such money into a client account.
>
> 18 In breach of the provisions of r 3 of the Solicitors' Accounts Rules 1967, the respondent paid the said costs into the office account of Murphy & Dunbar.
>
> 19 The respondent subsequently wrongfully appropriated the said taxed costs which lawfully belonged to the complainant.
>
> 20 Despite several written demands by the complainant, namely, by letters dated 23 March, 23 August and 3 October 1985, the respondent refused to pay to the complainant the sum of $35,121.75 to which she was lawfully entitled.

There are thus three charges against the respondent:

(1) Breach of r 3 of the Solicitors' Accounts Rules.
(2) Breach of s 109(1) of the Act in that he taxed the party and party costs in excess of the agreed solicitor and client costs.
(3) Wrongful appropriation of party and party costs which lawfully belonged to the complainant.

The Disciplinary Committee ('Committee'), appointed under s 86 of the Act to hear and investigate the matter, sat and heard evidence from the complainant, Heng and the respondent. In its report dated 14 July 1987, the Committee determined that cause of sufficient gravity existed against the respondent in respect of all three charges.

Before turning to consider whether each of these three charges could be maintained against the respondent, it is necessary to consider a fundamental submission advanced by counsel for the respondent, underlying the entire disciplinary proceedings in the present case, namely, the existence of a valid 'complaint' against the respondent.

The complaint

The disciplinary proceedings in the present case started off with a letter written by the complainant to the Law Society dated 23 October 1985. The letter is in these terms:

> Dear Sir
>
> Re: M/s Murphy & Dunbar
>
> I am writing to ask for your guidance and help in a matter involving M/s Murphy & Dunbar and myself.
>
> I enclose copies of the following letters:
>
> (a) M/s Murphy & Dunbar's letters of 26 November 1982 and 27 December 1982.

(b) My letters of 23 March 1985.
(c) M/s Murphy & Dunbar's letter of 27 March 1985.
(d) My letter of 2 May 1985.
(e) M/s Murphy & Dunbar's letter of 13 August 1985.
(f) My letter of 23 August 1985.
(g) M/s Murphy & Dunbar's letter of 20 September 1985.

According to M/s Murphy & Dunbar's letter of 13 August 1985, they received the sum of $35,121.75 from the other party on 13 January 1983 and another $400 later on when the other party decided not to go ahead with the appeal.

Since the matter was completed, I could not understand why I did not receive payment of the money received from the other party for my costs and expenses. I had paid to M/s Murphy & Dunbar the agreed $25,000. After many unsuccessful attempts to ask for the money to be paid to me, I finally wrote to M/s Murphy & Dunbar on 23 March 1985.

Their letter of 13 August 1985 came as a surprise to me. They denied that their costs and expenses has been paid and said that if they paid me the money it would be a sharing of their legal costs and expenses. I replied on 23 August 1985 reminding them of the agreement that I was to pay $25,000 as agreed costs and expenses for the matters including the appeal. In their reply they again denied the agreement.

The agreement is mentioned in M/s Murphy & Dunbar's letters of 26 November 1982 and 27 December 1982. I have paid them their costs and expenses as far back as 1982. As to what they mean by having to share their legal costs and expenses with me, I still cannot understand. As far as I know the costs given by the court was for me and not for M/s Murphy & Dunbar and there should be nothing wrong in the costs being paid to me.

I believe it was part of M/s Murphy & Dunbar's job to tax the bill of costs and to recover the amount payable from the other party on my behalf. I do not know how the amount in the bill of costs was arrived at as I left the matter in M/s Murphy & Dunbar's hands.

I have already paid what is a substantial amount to me to M/s Murphy & Dunbar for the costs and expenses. In view of the difficult times now, I need the money and I do not want to be involved in further law suits nor have to pay for another lawyer. I hope you will be able to assist me so I can recover the money from M/s Murphy & Dunbar. I would be grateful for your advice too as to what I should do if they do go ahead with the taxation.

Sgd: Mdm Chua

Counsel for the respondent submitted that this letter by the complainant does not constitute a 'complaint' within the meaning of s 82(1). It was argued that there was no complaint connoting an accusation of professional misconduct, much less a charge of misconduct against the respondent personally. At most, it reveals a dispute concerning a possible breach of contract between the complainant and the respondent and such dispute does not constitute misconduct.

The relevant provision of the Act is s 82(1):

82 (1) Any application by any person that an advocate and solicitor be dealt with under this Part and *any complaint of the conduct of an advocate and solicitor in his professional capacity* shall in the first place be made to the Society and the Council shall refer the application or complaint to the Chairman of the Inquiry Panel. (Emphasis added).

The relevant limb of the sub-section is 'complaint of the conduct'. It is important at the outset, to observe that it is not a matter of any complaint which suffices to found the jurisdiction of the Committee: the expression used in the sub-section is 'complaint of the conduct'. Some assistance as to the meaning of these words is afforded by the English case of *Harmon* v *Park*[1] at p 328, dealing with a similar phrase, 'complaint of conduct', in s 13 of the Corrupt Practices (Municipal Election) Act 1872 where Lord Selborne LC said: 'The words 'complaint of the conduct' must, as I read them, be taken to mean that there must be an imputation of misconduct.' In *In Re An Advocate and Solicitor*[2] at p 116, Thomson J, when dealing with a similar phrase in s 27 of the Advocates and Solicitors Ordinance, observed as follows:

> ... I can find no authority for saying that where the party in breach of a contract is a solicitor he should be subject to punishment for improper conduct unless it is clearly found that the breach has been attended by some circumstance of dishonesty.
>
> Apart from any question of authority, I am not prepared to say that there is anything disgraceful or dishonourable in a solicitor refusing to comply with a request to pay over money to a client unless it is shewn that the refusal is actuated by dishonest motives. It seems to me that if I were to hold otherwise it would be unsafe for a solicitor to attempt to defend himself against any claim made against him by a client, however confident he was of the justice of his case.

It is clear from these observations that a complaint concerning a civil dispute simpliciter, unaccompanied by any allegation of misconduct, does not constitute a 'complaint of the conduct' within s 82(1).

The question is whether the letter dated 23 October 1985, set out above, amounts to a 'complaint' in the sense described above. In her letter, the complainant made no allegation of impropriety or misconduct on the part of the respondent; and, indeed, made no mention at all of the respondent. It merely sought 'guidance' and 'help' in the face of a dispute with Murphy & Dunbar. On a plain reading of that letter, the complaint, if any, in this case was the failure of Murphy & Dunbar to pay $35,521.75 which allegedly it was contractually obliged to pay to the client, and which Murphy & Dunbar disputes. The letter, however, enclosed and made references to an exchange of correspondence with Murphy & Dunbar. It is necessary to examine these correspondence in some detail to see whether or not they contained any allegation of misconduct against the respondent personally.

By letter dated 26 November 1982, Murphy & Dunbar again wrote to the complainant as follows:

> You will recall that I spoke to you a few weeks ago about the solicitor and client costs in the above matter. We suggested the figure of $25,000 to which you agreed. You have paid us

to date an amount of $10,000 to account, and therefore there is a balance of $15,000 still to be paid by you. We look forward to receiving this amount as soon as possible.

By another letter dated 27 December 1982, Murphy & Dunbar, again, wrote to the complainant:

We refer to the above matter and thank you for your cheque in the sum of $15,000 being payment of the balance of the agreed solicitor and client fees. We enclose herewith our official receipt.

Some two years later, on 23 March 1985, the complainant wrote to Murphy & Dunbar asking for payment of the taxed party and party costs which were paid to the respondent by the solicitors of Wong's estate.

I understand that you have received payment of the taxed costs of $35,121.75 from the petitioners. Up-to-date, I have not received payment of same from you. I shall be obliged if you could kindly let me have the taxed costs of $35,121.75 before the end of the month.

It is important, at this juncture, to observe that the party and party costs were paid by Wong's estate on 12 January 1983, and the complainant was aware of it, having been informed by Heng either on 14 or 15 January 1983. It was, however, not until 23 March 1985, some two years later, that the complainant made this first demand for the payment of the taxed party and party costs by letter dated 23 March 1985. On 27 March 1985, Murphy & Dunbar replied:

Thank you for your letter of 23 March 1985. We think it would be better for you to call on us, by prior appointment, to discuss this matter with our Mr Cashin when he can explain to you the position.

On 2 May 1985, the complainant wrote to Murphy & Dunbar:

Thank you for your letter of 27 March 1985. As you know there are other shareholders and directors of the company. In the circumstances I shall be grateful if you could please let me have the explanation of the position in writing so that I can show it to them as well as to the company's auditors in the event of queries by them on the matter.

Thank you.

On 13 August 1985, Murphy & Dunbar replied to the letter dated 2 May 1985. The relevant paragraphs are as follows:

In order that the matter can be fully understood we have to go back to the period when judgment had been given in your favour by the High Court. From what you told us and from what we gathered both you and we believed that we would not be able to obtain party and party costs from the administrators of Albert Wong's estate. We, therefore, discussed this matter with you and you agreed to let us have an additional $15,000, bringing the total which you had paid to us up to $25,000 and it was left to us to see if we could obtain the party and party costs.

The party and party bill was taxed and allowed in the sum of $35,121.75 which included all disbursements and allocator and taxing fees. The said taxed costs were paid to our surprise on 13 January 1983. Messrs Tan Rajah & Cheah also paid us the sum of $400 on 27 July 1983 on the withdrawal of their bill in respect of the appeal. The total received by us therefor was the sum of $35,521.75 from Messrs Tan Rajah & Cheah.

We cannot let you have this sum of $35,521.75 because if we do, it will mean that we will be sharing our costs with you which is not permitted under the Legal Profession Act.

If the party and party bill has been taxed in the sum of $35,521.75 it will follow that our solicitor and client bill would be in the region of $50,000 which would, of course, include the amount of the taxed party and party bill. We would also be entitled to solicitor and client costs for the appeal which was withdrawn in respect of which Messrs Tan Rajah & Cheah have paid $400 party and party costs. We would expect our solicitor and client bill in respect of the appeal to be say, $750 which would again include the party and party figure of $400. Additionally, we prepared all the documents for a charging order to be registered against the Goodman Road property to secure the party and party costs. Again we think our solicitor and client costs for this work would amount to say, $750.

We have drawn up a solicitor and client bill, which we enclose, for a total sum $51,500.

We have first to ask you whether you are prepared to agree to this figure. If so, we will then pay to you the sum of $9,021.75 which has been arrived at as follows:

If you wish to discuss our bill or cannot understand any of the contents of this letter, please feel free to call upon our Mr Cashin.

On 23 August 1985, the complainant replied:

I refer to your letter of 13 August 1985 which I received on 16 August 1985.

On the second paragraph, the agreement was originally that I should pay you $10,000 as costs and expenses for the matter. Subsequently you informed me it was possible the other party might appeal against the judgment and it was then agreed that I should pay you another $15,000 which together with the first $10,000 would be all the costs and expenses payable by me to you up to and including the appeal. In November 1982 you requested me to pay the remaining $15,000 of the agreed costs and expenses of $25,000 and I did so.

I therefore cannot understand para 4. Since I paid you the agreed costs and expenses in full, the taxed costs awarded to me should be paid to me. There is no question of sharing legal costs.

I believe the procedure mentioned in para 5 would be applicable had there been no agreement between us as to the costs and expenses. Also as I mentioned earlier the $25,000 included all work for the appeal. I do not understand why documents were prepared for a charging order. You wrote to me on 12 January 1983 that you propose to take the step of issuing a charging order and requested my approval and you also informed me that a grace period of seven days for payment was to be given. As mentioned by you the taxed costs were paid on 13 January 1983 and there would be no need to prepare documents for the charging order.

I cannot accept the bill since it is not in accordance with the agreement between us. As it is now more than two years since the taxed costs were paid and I need the moneys urgently, please let me have immediately the sum of $35,521.75.

By letter dated 20 September 1985, Murphy & Dunbar replied. The relevant paragraphs are as follows:

> Thank you for your letter of 23 August 1985. I regret the delay in replying but, since my return from leave, I have been extremely busy.
>
> I am sorry to say that the history you related is not correct. It is not correct that you paid $10,000 and $15,000. You first paid $2,000 on 5 March 1982 and you then paid a further $8,000 to account of costs on 22 April 1982. It is true that I requested you to make a further payment and you did pay a further sum of $15,000 on 27 December 1982 also to account of costs. You, no doubt, have the original receipts which we sent you and if you peruse them you will see that in each case, payment was stated to be to account of costs. Nowhere have we stated that it was in full and final payment of our costs or to our agreed costs which we would have stated if that was the case.
>
> What we said in our letter of 13 August 1985 is correct and we have to tell you that if you do not agree our proposed solicitor and client bill in the sum of $51,500 and agree to accept the balance of $9,021.75, you can, of course go and have our bill taxed.
>
> We are still open to an attempt to agree a figure. However, there must be finality in this matter and we have to ask you to make your mind up within three weeks, failing which we will proceed to have our bill taxed. On the other hand, if you think we have made an agreement as to costs, you may sue us.

On 3 October 1985, the complainant wrote:

> I received your letter of 20 September 1985 and 23 September 1985. I am unable to understand why you mentioned in para 2 of your letter that the history related by me is not correct. I did not say that I paid you the $10,000 in one sum. What I said was that the agreement was originally that I should pay you $10,000 as costs and expenses for the matter. The payment of $15,000 was definitely not to account of costs. Your covering letter of 27 December 1982 clearly stated the payment was the balance of the agreed solicitor and client fees.
>
> What I have stated in my letter is correct. I am still unable to understand your explanation for the papers for the charging order. Since you wrote to me to ask for my approval, it must be that my instructions were required before you could proceed with the matter. As to the second last sentence of para 4 of your letter, this is purely a conjecture on your part on a situation which did not arise. I do not understand too why you should be aggrieved. I have not done anything to cause you to feel aggrieved. I regret that if I do not receive the sum of $35,521.75 within seven days from today's date, I will have to write to the Law Society to ask for their advice.

By letter dated 5 October 1985, Murphy & Dunbar replied:

> Thank you for your letter of 3 October 1985. You, of course, must do what you think is proper. We propose having your bill taxed in the light of what you say.

It is, in our view, clear from these letters that there is a dispute between Murphy & Dunbar and the complainant as to the precise terms of the agreement which they had entered into. In our view, it was because of this dispute that the complainant sought recourse to the Law Society to ask for their 'guidance and help' and their 'advice'. In our opinion, there was no suggestion in these letters that the respondent ever intended to deprive her of anything which might be due to her. The respondent's claim to the taxed costs rested upon his view that there was no obligation on his part to pay the $35,521.75 to her. It is clear that this is a dispute which has to be resolved in a civil court, and the complainant's letter to the Law Society stating that there was an agreement as to costs which her solicitors dispute is, in our view, not such a 'complaint of the conduct' envisaged by s 82(1), much less a complaint of misconduct against the respondent personally. In our judgment, such an allegation of breach of contract simpliciter cannot in any way constitute an allegation of misconduct on the part of the respondent. As Thomson J remarked, 'If I were to hold otherwise, it would be unsafe for a solicitor to attempt to defend himself against any claim made against him by a client, however confident he was of the justice of his case.'

The Committee arrived at a different conclusion on the footing that the language used in the so-called complaint was the language of a lay person, the complainant, who, the Committee said, 'cannot be expected to make a specific charge in legal language or to refer to the provisions of the Legal Profession Act.' It is true that generally, allowance ought to be given for the language used by a lay complainant, but this factor does not avail the complainant in the present case, because the evidence established that an advocate and solicitor, Mdm Ruth Kao, drafted all letters including the letter of 23 October 1985 for the complainant, as the following passage shows:

> Q: So, you suggested another family lawyer, Miss Ruth Kao, to Clive Heng and Clive Heng said she is not strong enough?
> A: Yes.
> Q: And then what happened?
> A: Then Miss Ruth Kao said she would help me to draft all the letters which I just sent in.
> Q: So, Miss Ruth Kao subsequently helped you draft all those letters?
> A: That's correct, Sir.
> Q: Copies of which you sent together with your letter to the Law Society? Is that right?
> A: Correct.

A further passage in cross-examination reiterates that Mdm Ruth Kao drafted all the letters and that the complainant had every sentence explained to her:

> Mr Lightman: Can I ask her another matter?
>
> Q: After Miss Ruth Kao began to draft your letters, after she took over writing your correspondence, you continued to read the correspondence, didn't you?
> A: More or less.
> Q: And you made sure that they were correct?
> A: She explained to me every sentence.

In coming to their decision that the so-called 'complaint', if written by a lay person may be couched in simple

language and that such letter complies with s 86(1), and then becomes a 'matter' for enquiry, the Committee failed to take into consideration the above passages. In our judgment, the conclusion of the Committee in this regard is against the weight of the evidence and without foundation. For these reasons, we reach the view that there is, in the present case, no valid 'complaint' against the respondent within the meaning of s 82(1). In our judgment, these proceedings fail in limine.

Our decision on this fundamental issue is sufficient to dispose of these proceedings; but having heard full argument on the substantive charges against the respondent, we think it only right that we deal with them in this judgment, not least because they raise matters of concern to the respondent and to the profession generally.

The first charge

The first charge is set out in para 18 of the statement of case:

> In breach of the provisions of r 3 of the Solicitors' Accounts Rules 1967, the respondent paid the said taxed costs into the office account of Murphy & Dunbar.

When dealing with this charge, it is important to keep in mind that the specific charge against the respondent is that in breach of r 3, *he paid* the taxed costs into the office account of Murphy & Dunbar. The charge against him is a charge of a personal character, and relates strictly to the conduct of the respondent himself. Rule 3 of the Solicitors' Accounts Rules is as follows:

> Subject to the provisions of rule 9 hereof, every solicitor who holds or receives client's money, or money which under rule 4 hereof he is permitted and elects to pay into a client account, shall without delay pay such money into a client account. Any solicitor may keep one client account or as many such accounts as he thinks fit.

It is common ground that the respondent was not in Singapore at the time of payment in and had nothing to do with the payment of the taxed costs into the office account. The Committee, however, concluded that, because there was 'a personal duty' on every solicitor, or 'joint responsibility' in the case of partnership, to ensure strict compliance with the account rules, each and every partner is responsible and liable for every breach. In arriving at this conclusion, the Disciplinary Committee failed to distinguish between 'joint and several responsibility', a civil responsibility, on the one hand; and a disciplinary responsibility, on the other. The confusion appears to have arisen because of the failure to appreciate that the exercise of the disciplinary power is essentially punitive and penal and is exercised in appropriate cases only where there is personal complicity by the solicitor charged. It is apposite, in this connection, to quote the words of Lord Atkin in *Myers* v *Elman*[3] at p 302:

> Misconduct of course may be such as to indicate personal turpitude on the part of the person committing it and to lead to the conclusion that the party committing it, if an officer of the court, is no longer fit to act as such. Over conduct such as that, punitive jurisdiction will be exercised, but *it seems hardly necessary to state that no punishment based on personal misconduct will be inflicted unless the party visited is himself proved to be personally implicated.* (Emphasis added).

It is true that in certain appropriate circumstances, the negligence of the solicitor in relation to a client account (eg failure to exercise adequate supervision) may amount to professional misconduct, 'if it is inexcusable and is such as to be regarded as deplorable by his fellows in the profession': per Lord Denning in *Re A Solicitor*[4] at p 815. But no one would dispute - and it has not been suggested otherwise - that such cases involve an element of personal neglect or misdoing on the part of the solicitor charged.

In the present case, the Committee made no finding that the respondent was personally implicated in the breach of the rules, and there was no evidential basis for such a finding. The charge laid against the respondent was confined solely to his wrongful payment of taxed costs into the office account in breach of r 3. It is common ground that the respondent had nothing to do with the payment into the office account, and not into the client account of Murphy & Dunbar. On this ground, we are of the view that the charge must fail.

The second charge

The second charge against the respondent is that contrary to an oral agreement limiting solicitor and client costs to $25,000, the respondent taxed or caused to be taxed the party and party costs in respect of the petition at $35,121.75, thereby contravening s 109(1) of the Act.

The relevant provisions are s 108 and s 109(1) of the Act:

> 108(1) Subject to the provisions of any other written law, a solicitor may make an agreement in writing with his client respecting the amount and manner of payment for the whole or any part of his costs in respect of contentious business done or to be done by the solicitor, either by a gross sum, or otherwise, and at either the same rate as or a greater or a less rate than that at which he would otherwise be entitled to be remunerated.
>
> (2) Every such agreement shall be signed by the client and shall be subject to the provisions and conditions contained in this Part.
>
> 109(1) Such an agreement as is mentioned in section 108 shall not affect the amount of, or any rights or remedies for the recovery of, any costs recoverable from the client by, or payable to the client by, any other person, and that person may, unless he has otherwise agreed, require any costs payable or recoverable by him to or from the client to be taxed according to the rules for the time being in force for the taxation of those costs:
>
> Provided that the client shall not be entitled to recover from any other person, under any order for the payment of any

costs which are the subject of the agreement, more than the amount payable by the client to his own solicitor under the agreement.

(2) Such an agreement shall be deemed to exclude any further claim of the solicitor beyond the terms of agreement in respect of any services, fees, charges or disbursements in relation to the conduct and completion of the business in reference to which the agreement is made, except such services, fees, charges or disbursements (if any) as are expressly excepted by the agreement.

(3) Subject to the provisions of this Part, the costs of a solicitor, in any case where there is such an agreement as is referred to in section 108, shall not be subject to taxation nor to the provisions of section 115.

(4) A provision in any such agreement that the solicitor shall not be liable for negligence, or that he shall be relieved from any responsibility to which he would otherwise be subject as a solicitor, shall be wholly void.

Counsel for the respondent advanced on his behalf two alternative submissions. The first is that the oral agreement in the terms alleged by the complainant was not an 'agreement' within the proviso in s 109(1) because it was not signed by the client as required by s 108. The second and alternative argument is that, on the evidence, it was not established beyond reasonable doubt that there was an oral agreement limiting solicitor and client costs to $25,000 and that, in any event, the agreement was imprecise and ambiguous.

We propose to deal with the alternative submission first. This is concerned with the question whether the Committee came to the correct finding that, on the evidence, there was an oral agreement constituted by the letter of Murphy & Dunbar dated 26 November 1982, set out earlier in this judgment, limiting solicitor and client costs to $25,000. This necessitates an examination of the whole of the evidence recorded verbatim before the Committee to see if the evidence points to equal probability of an agreement which did not limit the costs to $25,000 but rather on terms alleged by the respondent as set out in para 10 of his defence:

(a) that the complainant pay a total sum of $35,000 to account of solicitor and client costs for the work done up to the dismissal of the petition which amount was the maximum she would have to bear in the event taxed party and party costs were not recoverable from the petitioners;

(b) in the event taxed party and party costs were recovered in full or in part, the respondent/Murphy & Dunbar would be entitled to charge solicitor and client costs according to the amount of work done to date and to present a bill to the complainant for agreement and failing agreement to have the said bill taxed.

The Committee relied upon the following matters as support for their finding that the agreement was according to the version given by the complainant, and not the respondent's:

(1) the credibility of the complainant: the complainant was speaking the truth.

(2) the contemporaneous letters: the complainant's account of the agreement was supported by three letters written by Heng.

(3) the respondent's version of the 'two-tier conditional agreement' set out in para 5 of the defence was fabricated.

It is important, at the outset, to state that these are essentially matters of fact for the tribunal. But, as *Cordery on Solicitors* (8th Ed) at p 327 puts it, 'where it appears from the evidence that the wrong decision in fact has been reached, it can be reversed', due regard being had to this court's disadvantage in not seeing or hearing the witnesses. Bearing these principles in mind, we turn to look at the evidence. On the evidence, there is no dispute between the respondent and the complainant that there was an oral agreement respecting costs: the dispute relates solely to the terms of that agreement. The respondent and Heng also gave evidence that the agreement arose out of a face-to-face meeting between the complainant and themselves, whereas the complainant's evidence was that the agreement was formulated in the course of a telephone conversation between Heng and herself.

The credibility of the complainant

The Committee expressed the view that:

> The complainant was telling the truth and that Clive Heng and the respondent were not speaking the truth. The complainant gave her evidence without any hesitation. She was not confused. She was cross-examined by an experienced Queen's Counsel at great length and with tenacity but the complainant was unshaken. She stuck to her version of what happened and there was a ring of truth in her story.

It is necessary to test this assessment of the complainant, on an objective litmus test, by reference to a number of specific issues. The first issue is the alleged meeting between the respondent, Heng and the complainant after the dismissal of the petition.

The respondent's evidence was that in the last week of October 1982, a meeting took place in the firm's office between the complainant, Heng and himself. The meeting was at the respondent's suggestion as he was concerned about the ability of the Wong estate to pay the costs following the dismissal of the petition. He was also anxious to settle the question of costs before he left for London on 3 November 1982. The respondent gave evidence that in the course of that October meeting, he expressed concern about the prospects of recovery of the party and party costs from Wong's estate, as he had been told by Heng that the complainant said that Wong's estate was likely to be impecunious. It was in these circumstances that the respondent then suggested to the complainant 'a conditional two-tier agreement' as set out in para 5 of the defence in which she would pay $35,000 but

if party and party costs were recovered, he would submit a full solicitor and client bill which would include the party and party costs. The respondent then told the complainant to think about the proposal. About half an hour later, Heng came to his room and asked him whether he was prepared to reduce the amount from $$35,000 to $25,000. The respondent agreed. Heng then went off and 'that's how that agreement came about'.

The complainant's stance throughout her evidence-in-chief was that there was never any meeting between Heng, the respondent and herself in the office of Murphy & Dunbar. She also denied that the respondent or Heng had ever mentioned the 'two-tier agreement' for costs in any discussion. She also maintained that at no time did she inform the respondent or Heng that Wong's estate was insolvent and unlikely to pay the taxed costs.

Under cross-examination, initially, she again denied that there was ever a meeting between herself, Heng and the respondent at their office:

> Q: Can I turn on to the matter of how the agreement, the $15,000 was reached. Isn't it right that first of all you had a meeting with Mr Cashin and with Clive Heng where Mr Cashin proposed that if it turned out that none of the costs could be recovered from the estate he would waive the balance of his fees beyond the figure of $35,000?
> Q: Yes?
> A: *Never. Never ever.*
> Q: Isn't it right that thereafter he told you to consider the proposal and you went back with Mr Clive Heng to his room and then you asked Mr Clive Heng to propose to Mr Cashin that the figure be reduced to $25,000.
> A: How can I propose when he talked in the phone to pay $25,000 for all.
> Q: When you were before the inquiry committee didn't you there agree that you had met Mr Cashin and that he had proposed this figure of $35,000?
> A: *I never met the three of us together to discuss.*

However, the complainant subsequently shifted her stance and admitted to having met the respondent and Heng at their office but not to discuss the question of costs but on 'how to revive the company':

> Q: Did you first of all in October after the judgment had been given by the judge dismissing the petition meet Mr Cashin and Mr Clive Heng together at their office at Murphy & Dunbar?
> A: I did meet them but not to discuss the $25,000. The figure of $35,000 never arose at that time.
> Q: You did meet them at their office sometime around October?
> A: Correct, how to revive the company, not to talk about costs.

It can thus be seen that the complainant's evidence was not entirely consistent. Her denial that there was such a meeting was only broken under persistent cross-examination, when she finally admitted that there was such a meeting after all. Furthermore, if, on the other hand, the story of the complainant is to be believed, then it appears that Heng came to an agreement on costs with the complainant in a telephone conversation without reference to the respondent. But both Heng and the respondent gave evidence that Heng had no authority to agree on costs and neither was challenged in the cross-examination.

The second litmus test on which the credibility of the complainant is to be assessed is by reference to her evidence as to the contents of the telephone conversation between Heng and herself concerning the $15,000. The complainant's evidence-in-chief was that she was told by Heng to pay an extra $15,000 to cover her total liability for costs including the costs of any appeal:

> Well, at that time, I wasn't clear about these terms, solicitor and client costs, client and client costs. I was only concerned with what I had to pay, what I gathered was my bill for the work done by the firm Murphy & Dunbar and I was told by Mr Clive Heng that the price altogether was $25,000. I never asked what to pay. He suggested the price of $15,000 plus $10,000.

and, further:

> ... but I was told to pay extra $15,000 so that it would cover everything and for further works to be done should there be an appeal as well, something like that and if there was a brief trial I had to pay for everything.

However, under cross-examination, the complainant gave a different response as to the purpose for the payment of $15,000:

> Q: If the agreement was intended to cover the costs of the appeal, didn't you think the $15,000 was a lot to cover the costs of the appeal when the appeal might be short and it might not take place at all?
> A: I told you before, because Mr Clive Heng said: 'Give me some extra money because of the good work done, something like, in Singapore, you know, we give as bonus or red packet for somebody who has done something else'.
> Q: You are not suggesting that the payment was made as a bonus?
> A: Well, I don't know what to call it. It's something he wanted. He said that. He suggested, I never suggested. He suggested this amount of money, I said okay. I never quibbled, I never asked what was it for. He said just pay the money.

This seems to suggest that the payment of $15,000 was in the nature of a reward for the services already rendered by the respondent's firm.

A careful perusal of all these passages reveals the inconsistency between her evidence-in-chief and her cross-examination, and, in our view, must at least have cast some doubt on her credibility.

The contemporaneous letters

The Committee, having dealt with the credibility of the complainant, went on to say:

> Furthermore, her assertion that the solicitor and client bill had been agreed between her and Heng at $25,000 was

supported by contemporaneous document. Three letters written by Clive Heng to the complainant prove *conclusively*, in the opinion of the Committee, that the solicitor and client costs had not only been agreed at $25,000 but also that they had been paid in full.

The first letter is dated 26 November 1982, which Heng wrote to the complainant:

> You will recall that *I spoke to you a few weeks ago* about the solicitor and client costs in the above matter. *We suggested the figure of $25,000* to which you agreed. You have paid $10,000 to account, and therefore there is a balance of $15,000 still to be paid by you.

Heng's evidence was that this letter was written on the respondent's instructions and that the words 'I spoke to you a few weeks ago' referred to the meeting during which the 'two-tier agreement' was made. The complainant, however, said that those words referred to the telephone conversation between Heng and herself. Heng, however, denied that the further payment of $15,000 was agreed in the course of the telephone conversation, though he recalled that he did telephone the complainant subsequent to the meeting at the office to remind her to pay the $15,000. In our view, those words were equivocal, and could also be fairly construed in the sense used by Heng. The second letter dated 27 December 1982 was written after the party and party bill of costs was taxed at $35,121.75 on 7 December 1982 and after the complainant had paid the $15,000 on 27 December 1982. It reads:

> We refer to the above matter and thank you for your cheque in the sum of $15,000 being the payment of the balance of the *agreed solicitor and client fees.*

The receipt which was enclosed with the letter, however, contradicts the letter as it states that 'payment was to account of our costs and disbursements'. This letter is thus equally supportive of the respondent's case. The reason why the letter was couched in the terms used was clearly explained by Heng in his examination-in-chief:

> A: Yes, in relation to the first sentence, this letter was written on 26 November 1982, so in the first sentence when I said 'I spoke to you a few weeks ago', that would have been in relation to the meeting held towards the end of October, that is the meeting after the petition had been dismissed. It was at that meeting that I had suggested to Mdm Chua the figure of $25,000 reduced from $35,000. That is the reason why I wrote the second sentence - 'We suggested the figure of $25,000 to which you agreed.' So her agreement was in relation to the proposal that we had made at that meeting towards the end of October.

It is thus probable that the agreed solicitor and client costs could also be equally consistent with the respondent's version that there was a 'two-tier agreement'.

The third letter replied upon by the Committee is dated 29 June 1983. It reads:

> We have pleasure in enclosing herewith a copy of a letter dated 28 June 1983 which we have received from Messrs Tan, Rajah & Cheah, solicitors for the petitioners. You will note that they are not proceeding with the appeal. According to the Rules of the Supreme Court, they have to obtain our consent to the withdrawal of their appeal and we have not given our consent as the question of costs has not been settled. We shall therefore be making an application to the Court of Appeal for an order as to the payment of our costs. In the meantime, we can safely consider that this matter has been concluded and we shall be closing our files.

The Committee quoted only the last paragraph of the letter, but it is clear that that paragraph must be read in the content of the subject matter of the letter, which is that Wong's estate was no longer pursuing the appeal.

In our view, when reading these letters, it is important to bear in mind that these are letters written not to a disinterested observer, but to a party to an agreement; and giving due allowance in this regard, we find it impossible to say that they prove 'conclusively' that there was oral agreement on the terms alleged by the complainant.

The respondent's version of the conditional 'two-tier agreement' was fabricated

The Committee rejected the respondent's version of the 'two-tier conditional agreement', expressing the view that this defence was fabricated by the respondent 'to cover up the unlawful appropriation of the taxed costs'. In reaching this finding, the Committee relied strongly on the fact that no mention at all was made in any of the letters of any such agreement between the complainant and the respondent. The Committee referred, in particular, to the letter dated 13 August 1985, where, in their view, 'the two-tier agreement was also not mentioned'.

We have earlier in this judgment referred to this letter. It is now necessary to set out only the relevant paragraph:

> In order that the matter can be fully understood we have to go back to the period when judgment had been given in your favour by the High Court. From what you told us and from what we gathered, both you and we believed that we would not be able to obtain party and party costs from the administrators of Albert Wong's estate. We therefore discussed this matter with you and you agreed to let us have an additional $15,000, bringing the total which you had paid to us up to $25,000 and it was left to us to see if we could obtain the party and party costs.

Contrary to the Committee's view, this paragraph, particularly the last sentence, clearly referred to an agreement between the respondent and the complainant whereby the complainant was to pay the sum of $25,000, leaving her solicitors to see if they could recover party and party costs. This is consistent with the terms of the 'two-tier agreement'. It is to be noted that this letter was written before the defence in these proceedings was filed and before the complainant had made any complaint to the Law Society. Moreover, from the nature of the events, there was no reason whatever for the respondent to enter

into any agreement limiting Murphy & Dunbar's costs to $25,000 in the light of the fact that (a) the time the agreement with regard to costs was entered into was *after* the successful hearing of the petition and that (b) the party and party costs had not been taxed. No lawyer in his senses would agree to limit his solicitor and client costs to a figure which would certainly be below the amount of party and party costs if there was no doubt about the ability to pay such costs by the other party. The necessity for a 'two-tier agreement' would only arise at this stage if Wong's estate could not pay the party and party costs. Then it becomes sensible for any lawyer to say that if the party and party costs were not paid by the estate, then and only then will he be prepared to make a concession so that the amount of solicitor and client costs to come out of the complainant's or company's pocket would be limited to $25,000. If party and party costs were paid by the estate, then a solicitor and client bill will have to be agreed or taxed failing agreement. Such costs must in any event be greater than the party and party costs. No other construction makes sense.

Inextricably bound up with this question of the 'two-tier agreement' is the crucial question whether the likely impecuniosity of Wong's estate was a matter pressed and fostered by the complainant. In this connection, it is necessary to quote, once again, the crucial paragraph of the letter dated 13 August 1985 from the respondent to the complainant:

> From what you told us and from what we gathered, both you and we believed that we would not be able to obtain party and party costs from the administrators of Albert Wong's estate. We *therefore* discussed this matter with you and you agreed to let us have an additional $15,000 ... and it was left to us to see if we could obtain the party and party costs.

In our view, the terms of this letter support the respondent's evidence that it was the likely impecuniosity of Wong's estate which led to the making of the two-tier agreement. The respondent's evidence was that in the course of taking instructions, the complainant had appraised them of the financial situation of Wong's estate:

> ... I had been told by Clive Heng that she had said that the estate of Albert Wong probably had no or very little funds. I was told this on more than one occasion and when I saw the complainant on the very few occasions I did see her in those intervening months, she confirmed this.

The complainant, however, denied that she told the respondent and Heng that Wong's estate was likely to be impecunious. But it is significant that this part of the respondent's evidence was not challenged in cross-examination by the Law Society's counsel. In our view, the probabilities are very high that the impecuniosity of Wong's estate was indeed a matter pressed and fostered by the complainant. Indeed, one wonders why otherwise an agreement should be made limiting her ordinary liability to costs. There is simply no other explanation. The Committee rejected the two-tier agreement on the further ground that there was delay on the part of the respondent in presenting the solicitor and client bill. The Committee remarked:

> Why did the respondent take two years to send a lump sum solicitor and client bill if there was a two-tier conditional agreement? The truth of the matter is that the solicitor and client costs having been agreed at $25,000 and having been paid in full, there was nothing left to be taxed.

The respondent, in evidence-in-chief, gave several reasons to account for the delay in presenting the bill. Firstly, he was extremely busy during 1983. Secondly, the clerk in charge of preparing the bill had resigned and her replacement had difficulties in coping with a huge backlog of bills. Thirdly, the complainant's case file had been misplaced and took some time to be located. Fourthly, it had completely escaped his memory that a solicitor and client bill had not yet been drawn up. The Committee rejected these explanations as 'lame excuses'. But, the Committee had failed to appreciate the significance of the fact that the respondent's reasons for the delay were never challenged by the Law Society's counsel in cross-examination.

In our judgment, upon the whole of the evidence, and in the light of the many inconsistencies in the evidence of the complainant and the cohesiveness and tenor of the evidence of the respondent and Heng, the findings of the Committee on this issue cannot be sustained, and, accordingly, the second charge fails. In the light of our decision on the alternative submission, it is unnecessary for us to deal with the submission that the oral agreement was not 'an agreement' within the proviso in s 109(1).

The third charge

The third charge is that the respondent had wrongfully appropriated the taxed costs which lawfully belonged to the complainant. In a fundamental sense, this third charge is contingent upon the first charge, that is, the wrongful payment of taxed costs into client's account, since the appropriation of taxed costs consists of the wrongful payment into the office account and are one and the same. When dealing with the first charge, we concluded that the respondent was not personally implicated in the payment in. It follows from this that the appropriation, if any, was by the person who made the payment into the office account, and not the respondent, and, on this ground the charge fails.

The Committee arrived at its determination to the contrary upon the ground that:

> The party and party costs were wrongly paid into the office account in January 1983. No efforts were made to put them back into the client account. At the end of 1983 when the profit and loss account of Murphy & Dunbar for the year 1983 was prepared, the party and party costs amounting to $35,521.75 were undoubtedly, in accordance with normal book-keeping practice, taken as profit for the year 1983 which were distributable amongst partners. There is no

getting away from this. There is no evidence to the contrary. No accountant or auditor was called to prove that the said party and party costs of $35,521.75 were not taken into account in calculating the profits for the year 1983.

In coming to this conclusion, the Committee failed, in our view, to appreciate that there was no evidential basis for such an inference. In the absence of evidence from the firm's accountants or a public accountant, it was simply not a matter on which the Committee could properly infer that the money would, in any event, have been appropriated at a later date as profits by the respondent and the partners. The onus of proof lay throughout on the Law Society to prove that wrongful appropriation took place. In our judgment, the onus had not been discharged.

Conclusion

In the result, the charges against the respondent fail, and even if there was a valid 'complaint' against him, the substantive charges against the respondent fail for the reasons we have given. The order nisi to show cause is discharged. We need also to record that we make no order on the respondent's application by way of motion to this court for leave to adduce further evidence, which, in the event, we do not find it necessary to consider. In all the circumstances of the present case, we consider that there ought to be no order as to costs.

Order nisi discharged.

Solicitors: *Murphy & Dunbar*; *YH Cheong*.

Reported by *Terence Tan Bian Chye*

Low Fong Mei & Anor v Ko Teck Siang & Ors and other applications

HIGH COURT (SINGAPORE) - SUITS NO 1613 OF 1983, 422 OF 1986 AND 296 OF 1987
THEAN J
4 MAY 1989

Civil Procedure - Statement of claim - Striking out - Whether claims covered by deed of family arrangement and consent order

Trusts - Executors and trustees of will - Whether released from obligations by deed of family arrangement

Contract - Deed of family arrangement and consent order - Whether present claims covered by deed - Deed only covering knowledge of parties at the time of the deed

Succession - Executors' and trustees' duties - Disputes regarding duties - Deed of family arrangement to settle disputes

The first plaintiff is the widow of a legatee under a will ('the will') which had as its executors and trustees the testator's widow and brother. Disputes arose among the executors and trustees and several suits were started by them against each other. These were later settled and a deed of family arrangement ('the deed') was made. The plaintiffs, however, later started an action ('the first action') against the testator's brother and two others, claiming a portion of the proceeds of the sale of shares by the defendants, which shares had been bequeathed to the plaintiff's husband. In the second action, the first plaintiff, as co-administrator of her husband's estate, made a claim for the shares themselves against the executors and trustees of the testator's estate and against the co-administrator of her husband's estate. It was later found that the statement of claim in the first action did not cover all the claims which the plaintiffs might have against all the parties. The third action was brought against the three defendants in the second action. Against the first two defendants, it was claimed that they failed, as executors of the testator's estate, to get in certain assets, and against the third defendant, it was alleged that he failed to assert the claims of the legatee's estate.

There is one common defence to all the claims of the plaintiffs: that all outstanding matters and disputes in relation to the estate and the administration thereof had been finally settled by the deed and, under the deed, all the beneficiaries had released the executors and trustees of the estate from all actions and claims. This defence formed the foundation of the applications made by the defendants to strike out the statements of claim and dismiss the actions against them respectively.

There were six appeals before the High Court - five by the plaintiffs and one by the defendants, against various orders made by the assistant registrars who heard the defendants' applications to strike out the statements of claim.

Held, allowing the plaintiffs' appeals and dismissing the first defendant's appeal:

(1) The doctrine of a court of equity is that a release shall not be construed as applying to something of which the party executing it was ignorant. A release must not therefore use the general words of a release as a means of escaping the fulfilment of obligations falling outside the true purpose of a transaction as ascertained from the nature of the instrument and the surrounding circumstances including the state of knowledge of the respective parties concerning the existence, character and extent of the liability in question and the actual intention of the releasor.

(2) The subject matter of the claims in the actions was not covered by the deed on the basis of the facts alleged and on the true construction. To decide whether the plaintiffs' claims fall within cll 13 and 14 of the deed, the court would have to consider the allegations and the counter-allegations of both parties.

(3) If what the first plaintiff alleged was true, there is a strong case for arguing that on equitable grounds her claims should not be barred by those provisions. Whether she would make good her claim is a matter of evidence and is also a matter of construction of the deed and in particular, cll 13 and 14 thereof.

(4) The first plaintiff was not attacking the deed or the order. It is not her case that the deed or order should be set aside or overthrown. Her case was simply that the subject matters of the claims are not within the scope of the deed.

(5) Although there was duplicity in the statement of claim in the second action and the third action, such duplicity does not warrant striking out the entire statement of claim in the third action. It may warrant striking out only part of the claim but that was not before the court.